

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JULIAN A. MILLER,

Plaintiff,

v.

STANLEY TAYLOR, individually and in
his official capacity as Commissioner of the
Delaware Department of Correction;
THOMAS CARROLL, individually and in
his official capacity as Warden of the
Delaware Correctional Center at Smyrna;
DR. ALIE, individually and in her official
capacity as Medical Director at DCC
Smyrna; IHUOMA CHUKS, individually
and in her official capacity as a Nurse at
DCC Smyrna; and First Correctional
Medical,

Defendants.

Civil Action No. 04-1367 (KAJ)

Demand For Jury Trial

**PLAINTIFF JULIAN MILLER'S REPLY BRIEF IN SUPPORT OF HIS MOTION
FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT AND IN
OPPOSITION TO DEFENDANT IHUOMA CHUKS' MOTION TO DISMISS**

For the reasons set forth in Plaintiff Julian A. Miller's (hereinafter referred to as "Plaintiff Miller") Motion for Leave to File a Third Amended Complaint and for the reasons below, Plaintiff Miller's Motion for Leave to File a Third Amended Complaint should be granted and Defendant Ihouma Chuks' Motion to Dismiss should be denied.

On September 19, 2006, Defendant Ihouma Chuks opposed Plaintiff Miller's Motion for Leave to File a Third Amended Complaint and filed a Motion to Dismiss. The bases for Defendant Chuks' filings were two-fold. She claimed that all claims against her should be dismissed because: (1) in violation of 18 Del. C. § 6853(a)(1), Plaintiff Miller failed to file an affidavit of merit; and (2) she was not served within 120 days of the filing of the complaint. Neither argument establishes a basis to dismiss the claims against Defendant Chuks.

The Court Granted Plaintiff Miller an Extension Until October 23, 2006 to file an Affidavit of Merit

In her Motion to Dismiss, Defendant Chuks claims that “[p]laintiff’s complaint was filed after October 9, 2003, and was not accompanied by either an affidavit of merit or a motion to extend the time for filing such affidavit. As such, plaintiff’s state law claims must be dismissed as a matter of law.” (D.I. 62) This assertion is without merit and factually not accurate. In his initial complaint filed on October 18, 2004 (D.I. 2), Plaintiff Miller did not allege medical negligence. Rather, Plaintiff Miller filed a motion for leave to file a second amended complaint on June 6, 2006 (D.I. 39), in which medical negligence was asserted *for the first time*. Accompanying this motion was a Motion to Extend Time to File an Affidavit of Merit (D.I. 42). The Court granted both of these motions and provided that “Plaintiff shall have until October 23, 2006 to file the required affidavit.” (D.I. 52). Accordingly, Plaintiff Miller has complied with the requirements of the Delaware Code and has nearly a month to file the required affidavit. Defendant Chuks’ assertions regarding this issue therefore are not a basis upon which to dismiss this action.

Good Cause Exists For Granting Plaintiff Miller’s Motion to Amend His Complaint

Federal Rule of Civil Procedure 4(m) provides in relevant part that provided “plaintiff shows good cause for the failure [to serve a complaint], the court shall extend the time for service for an appropriate period.” In this case, Plaintiff Miller, while incarcerated and acting as a pro se plaintiff, attempted to serve Defendant Chuks via the U.S. Marshal Service in compliance with Fed. R. Civ. P. 4. (D.I. 25). However, Plaintiff Miller did not have Defendant Chuks complete name or the resources to obtain it, and he named “RN Ihoma” as a defendant. Once Plaintiff Miller obtained Defendant Chuks proper name, he promptly filed this motion to amend the complaint to correctly identify Defendant Chuks and to affect proper service.

Despite having only incomplete information while incarcerated, Defendant Chuks informed Plaintiff Miller that she received the original complaint and no longer wanted to treat him while he was incarcerated since he filed a law suit naming her as a defendant. (D.I. 41 at ¶ 64).

Williams v. Allen, 616 F.Supp. 653 (D.C.N.Y.1985) provides guidance as to the proper resolution of this issue. In *Williams*, a civil rights complaint served upon a police officer approximately three and one-half years after the filing of the complaint was not dismissed, when plaintiff was an incarcerated pro se prisoner who depended solely upon a United States marshal to effect service. The Williams Court granted the plaintiff additional time to re-serve the police officer, in effect granting an extension of time pursuant to Fed. R. Civ. P. 6(b).

Likewise, in the instant case, Plaintiff Miller respectfully requests that the Court allow him to amend his complaint to properly identify and serve Defendant Chuks. While not properly served, Defendant Chuks has been aware of this suit for over a year and has in no way been prejudiced by not being involved as defendant in this case to date. This case is in the early discovery stages, and a scheduling conference has yet to be held.

Conclusion

For the reasons identified, Plaintiff Miller respectfully requests that his Motion for Leave to File a Third Amended Complaint be granted and that Defendant Ihouma Chuks' Motion to Dismiss be denied.

Dated: September 29, 2006

FISH & RICHARDSON P.C.

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Julian A. Miller

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2006, I electronically filed with the Clerk of Court **PLAINTIFF JULIAN MILLER'S REPLY BRIEF IN SUPPORT OF HIS MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT AND IN OPPOSITION TO DEFENDANT IHOUMA CHUKS' MOTION TO DISMISS** using CM/ECF which will send electronic notification of such filing(s) to the following Delaware counsel, and by the methods provided below.

BY EMAIL AND BY HAND

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